SAW SENG KEE

v.

NADZRI & NG SECURITIES SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: A-04-12-1995]
5 OCTOBER 1995

CIVIL PROCEDURE: *Pleadings - Striking out claim - Whether facts show cause of action - Whether trial Judge entitled to make assumptions of fact - Delay - Principles applicable*

TORT: *Fraud - Fraudulent misrepresentation - Forgery - Share certificates - Whether genuineness of shares can be presumed by Court hearing striking out application - Whether a matter for trial Court - Liability of stock brokers*

The appellant ('Saw') bought 85 lots of shares in a company called Pahang Investment Public Ltd. Co. ('PI') between October 1985 and March 1986 through two remisiers ('the remisiers') employed by the respondent brokers ('the brokers'). On 14 October 1985, trading in PI shares was suspended by the Kuala Lumpur Stock Exchange ('KLSE') and PI was delisted in 1988. Saw was informed that criminal investigations had been launched into the activities of PI because more than 32 million fake shares in PI had been issued, the certificates supplied to him by the brokers were forgeries and he had been cheated. On 13 November 1989, he brought an action against the remisiers and the brokers in contract and tort, pleading negligence and fraudulent misrepresentation, alleging the brokers, as employer, were vicariously liable for the acts of the remisiers.

On 22 October 1992, the brokers applied to strike out Saw's action under O. 14 r. 21(1) of the Subordinate Court Rules 1980 (identical to O. 18 r. 19(1)(a)-(d) of the Rules of the High Court 1980 ('RHC')) on the ground that it disclosed no cause of action. The remisiers had earlier filed a similar application in December 1991. The brokers' application was supported by several affidavits averring, *inter alia*, that the brokers had no responsibility to ensure the genuineness of the share certificates, and the body with that responsibility was the Registrar of PI or the Securities Clearing Automated Network System Sdn. Bhd. ('SCANS'). The Sessions Court Judge dismissed both applications and the defendants appealed to the High Court. The High Court Judge reversed

the decision and struck out the action. Saw applied for leave to appeal but only obtained leave against the brokers.

Held:
Per Mahadev Shankar JCA:

[1] The averments in the affidavits were nothing more than bare allegations which raised a question of law and fact which had to be settled at the trial. There was no uncontroverted evidence that the establishment of SCANS or the suspension and delisting of PI extinguished any contractual or tortious liability of the brokers to Saw.

[2] The brokers, in their defence, were not prepared to provide information on the source of the allegedly forged shares and were not prepared to assert they were genuine. Thus the question as to whether the shares were genuine or forged was a matter for proof at the trial.

[3] It is important to first establish the facts before attempting any short cuts as the provisions of O. 18 r. 19(1)(b) – (d) do not apply if the disputed facts once established at the trial will support a cause of action. In order to establish the correct approach to striking out applications, one should keep in mind the following principles: (i) the facts should be ascertained in the trial Court before the difficult point of law is decided; (ii) one must be extremely cautious in allowing applications to strike out; and (iii) preliminary points should not readily be allowed to be taken since this frequently adds to the difficulties of Courts of appeal and tends to increase the cost and time of legal proceedings. In this case, the High Court Judge had assumed that the shares were genuine when such a finding could only be made at the end of the trial.

[4] On the grounds of delay alone, the application should have been dismissed as no proper reasons were given by the brokers as to why their application was made so very late, especially after lengthy adjournments for them to file their defence.

Held:
Per Abu Mansor Ali JCA:

[1] The power to dismiss an action summarily is a drastic power and should only be exercised with the utmost caution in plain and obvious cases. There are issues here which need ventilating at a proper trial. The issue of forgery cannot be presumed but must be proved as the shares were apparently not issued by any authorised person but yet were held out as good shares by the brokers.

Obiter dicta:

[1] Certain averments in the brokers' affidavits, e.g. reference to the suspension and delisting of PI on 14 October 1985 and 29 February 1988, respectively, and subsequent assertion that Saw's transactions had in fact been carried out whilst PI was listed although the documentary evidence showed otherwise, raised serious doubts about the brokers' credibility.

[2] If the shares were indeed forgeries, the brokers were liable at common law to refund the price paid and the commission.

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Pliding - Membatalkan tuntutan - Samada fakta-fakta menunjukkan kausa tindakan - Samada hakim perbicaraan berhak untuk membuat tanggapan fakta - Kelewatan - Prinsip-prinsip yang terpakai*

TORT: *Fraud - Salah nyataan secara fraud - Pemalsuan - Sijil-sijil saham - Samada ketulenan saham-saham boleh dianggapkan oleh Mahkamah yang mendengar permohonan pembatalan - Samada merupakan perkara Mahkamah perbicaraan - Tanggungan broker saham*

Perayu ('Saw') telah membeli 85 lot saham-saham dalam sebuah syarikat yang dikenali sebagai Pahang Investment Public Ltd. Co. ('PI') antara bulan Oktober 1985 dan Mac 1986 melalui dua remisier ('remisier-remisier') yang telah diambil bekerja oleh broker-broker responden ('broker-broker'). Pada 14 Oktober 1985, perdagangan dalam saham-saham PI telah digantung oleh Bursa Saham Kuala Lumpur ('BSKL') dan PI telah dikeluarkan daripada senarai dalam tahun 1988. Saw telah dimaklumkan bahawa siasatan jenayah telah dimulakan bagi menyiasat aktiviti-aktiviti PI kerana lebih daripada 32 juta saham-saham palsu dalam PI telah dikeluarkan, sijil-sijil yang telah dibekalkan kepadanya oleh broker-broker adalah palsu dan beliau telah ditipu. Pada 13 November 1989, beliau telah mengambil tindakan terhadap remisier-remisier dan broker-broker dalam kontrak dan tort, memplid kecuaian dan salah nyataan secara fraud, mengatakan bahawa broker-broker tersebut, sebagai pekerja, adalah secara tidak langsung bertanggungan bagi perbuatan-perbuatan remisier-remisier.

Pada 22 Oktober 1992, broker-broker telah memohon untuk membatalkan tindakan Saw di bawah A. 14 k. 21(1) Kaedah-kaedah Mahkamah Rendah 1980 (bersamaan dengan A. 18 k. 19(1)(a)-(d) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa ianya tidak mendedahkan apa-apa kausa tindakan. Remisier-remisier telah pada awalnya memfailkan satu permohonan yang serupa dalam bulan Disember 1991. Permohonan broker-broker tersebut telah disokong oleh beberapa afidavit yang menegaskan,

antara lainnya, bahawa broker-broker tersebut tidak bertanggungjawab untuk memastikan ketulenan sijil-sijil saham tersebut, dan pertubuhan yang mempunyai tanggungjawab itu adalah Pendaftar PI atau Securities Clearing Automated Network System Sdn Bhd. ('SCANS'). Hakim Mahkamah Sesyen telah menolak kedua-dua permohonan dan defendan telah merayu kepada Mahkamah Tinggi. Hakim Mahkamah Tinggi telah mengakaskan keputusan tersebut dan membatalkan tindakan itu. Saw telah memohon kebenaran untuk merayu tetapi telah hanya mendapa kebenaran terhadap broker-broker.

Diputuskan:
Oleh Mahadev Shankar HMR:

[1] Penegasan-penegasan dalam afidavit-afidavit di sini adalah tidak lebih daripada penegasan-penegasan semata-mata yang mana telah membangkitkan persoalan undang-undang dan fakta yang mana haruslah diselesaikan di perbicaraan. Tidak terdapat keterangan yang tidak dipertikaikan bahawa pertubuhan SCANS atau penggantungan dan pembatalan penyenaraian PI telah melucutkan sebarang tanggungan tort atau kontraktual broker-broker terhadap Saw.

[2] Broker-broker, dalam pembelaan mereka, tidak bersedia untuk memberikan maklumat mengenai sumber saham-saham palsu yang dikatakan dan tidak bersedia untuk menegaskan bahawa saham-saham itu adalah tulen. Dengan itu persoalan sama ada saham-saham tersebut adalah tulen atau dipalsukan merupakan perkara untuk dibuktikan di perbicaraan.

[3] Adalah penting untuk menentukan fakta-fakta sebelum cuba untuk menyelasaikannya dengan jalan pintas kerana peruntukan-peruntukan A. 18 k. 19(1)(b)-(d) tidak terpakai jika fakta-fakta yang dipertikaikan itu, sebaik sahaja ditentukan di perbicaraan, akan menyokong satu kausa tindakan. Bagi menentukan bahawa pendekatan yang betul digunakan untuk membatalkan permohonan-permohonan, seseorang harus mengambilkira prinsip-prinsip berikut: (i) fakta-fakta seharusnya ditentukan dalam Mahkamah perbicaraan sebelum perkara undang-undang yang sukar diputuskan; (ii) seseorang mestilah amat berhati-hati dalam membenarkan permohonan untuk pembatalan; dan (iii) perkara-perkara permulaan tidak seharusnya dibenarkan dengan berleluasa kerana ini selalunya menambah kesukaran Mahkamah rayuan dan akan meningkatkan kos dan masa prosiding undang-undang. Dalam kes ini, Hakim Mahkamah Tinggi telah menganggapkan bahawa saham-saham tersebut adalah tulen sedangkan keputusan yang sedemikian hanya boleh dibuat di penghujung perbicaraan.

[4] Atas alasan-alasan kelewatan sahaja, permohonan tersebut seharusnya telah ditolak kerana tiada alasan-alasan yang wajar telah diberikan oleh

broker-broker tersebut mengenai mengapa permohonan mereka telah dibuat lewat, khasnya selepas penangguhan yang panjang bagi mereka memfailkan pembelaan mereka.

Diputuskan:
Oleh Abu Mansor Ali HMR:

[1] Kuasa untuk menolak sesuatu tindakan secara terus adalah suatu kuasa yang drastik dan hanya harus dilaksanakan dengan berhati-hati dalam kes-kes yang ketara dan yang biasa. Terdapat isu-isu di sini yang perlu disuarakan di perbicaraan yang wajar. Isu pemalsuan tidak boleh hanya dianggapkan tetapi mestilah dibuktikan kerana saham-saham itu jelasnya telah tidak dikeluarkan oleh orang-orang yang telah diberi kuasa tetapi ianya masih dikemukakan sebagai saham-saham yang baik oleh broker-broker tersebut.

Obiter dicta:

[1] Beberapa penegasan dalam afidavit-afidavit broker-broker, contohnya rujukan kepada penggantungan dan pembatalan penyenaraian PI pada 14 Oktober 1985 dan 29 Februari 1988, masing-masingnya, dan penegasan berikutnya bahawa transaksi Saw telah pada hakikatnya dijalankan ketika PI masih disenaraikan walaupun keterangan dokumentari menunjukkan sebaliknya, telah membangkitkan keraguan mengenai keboleh-percayaan broker-broker tersebut.

[2] Jika saham-saham tersebut sesungguhnya palsu, broker-broker tersebut adalah bertanggungan di sisi common law untuk membayar-balik harga dan komisyen yang telah dibayar.

Cases referred to:
Syarikat Soon Theam Sdn. Bhd. v. Hing Chye Jiu [1975] 1 MLJ 259 ***(refd)***
Ruben v. Great Fingall Consolidated [1906] AC 439 ***(refd)***
South London Greyhound Racecources Ltd. v. Wake [1931] 1 Ch. 496 ***(refd)***
Dixon v. Kennaway & Co. [1900] 1 Ch. 833 ***(refd)***
Lamert v. Health [1846] 153 ER 94 ***(refd)***
Richards v. Naum [1966] 3 All ER 812 ***(foll)***
Allen v. Gulf Oil Refining Ltd. [1981] 1 All ER 353 ***(foll)***
Tilling v. Whiteman [1980] AC 1 ***(foll)***
Wenlock v. Moloney [1965] 2 All ER 871 ***(refd)***
Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 28 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 63
Rules of the High Court 1980, O. 18 r .19(1), O. 33
Subordinate Court Rules 1980, O. 14 r. 21(1)

Other sources referred to:
Australian Company Law and Practice, p. 233
Buckley on the Companies Acts, 113th Edn., p. 186
Company Law, Pennington, 2nd Edn., pp. 112-113
English and Empire Digest, Vol. 9, 1975 Reissue), pp. 313-315
English and Empire Digest Replacement Volume 1965, para. 54, p. 397
Palmers Company Law, 24th Edn., 1987, p. 254

For the appellant - Karpal Singh, (Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.
For the respondent - Balbir Singh, (Palanivel with him); M/s. Rashid & Lee

JUDGMENT

Mahadev Shankar JCA:

Between October 1985 and March 1986 Saw Seng Kee (the plaintiff) bought 85 lots of shares in a company called Pahang Investment Public Limited Company (PI). He did so through two remisiers Ng Kian Chong (Ng) and Saw Cheng Hoe (Saw). They were both employed by Nadzri & Ng Securities Sdn. Bhd. (the brokers). The plaintiff gave Ng and Saw cheques totalling RM94,226.15 for the aforesaid shares. These cheques were made out in favour of the brokers.

On 14 October 1985 trading in PI shares was suspended by the Kuala Lumpur Stock Exchange (KLSE) which delisted the company on 29 February 1988. According to information received by the plaintiff from the Malaysian Investors Association (MIA), criminal investigations had been launched into the activities of PI because spurious shares in PI in excess of 32 million units had been issued, certificates supplied to him by the brokers were forgeries and he had been cheated. MIA advised the plaintiff to get an amicable settlement from his brokers failing which he should issue a writ. According to the information received by the brokers, the chairman of the KLSE issued a press release on 11 April 1988 that PI had gone into liquidation and that therefore shareholders should file their claims with the liquidators. He said that unless the Registrar or the authorities could confirm that the shares were forged shares the brokers would not be in a position to assist the last buyers to seek original sellers for replacement with good certificates, and advised the public to await the outcome of the police investigation. In each case the information received was "hearsay"' and could only become direct evidence when given first hand in a trial.

The plaintiff did not get satisfaction and filed his writ in the Sessions Court at Taiping on 13 November 1989. He sued Ng, Saw and the stockbrokers. From his statement of claim it is obvious that his action was not just based in contract. He also pleaded negligence and fraudulent misrepresentation on the

part of all the defendants. These are causes of action in tort. He alleged that the brokers were vicariously liable for the acts of Ng and Saw as remisiers employed by them. The essence of these allegations in tort was that the shares were forgeries.

Ng and Saw filed a defence denying liability. So did the brokers who also took out third party proceedings against the KLSE. The defendants got lengthy adjournments on the ground that they needed time to get details from the KLSE. Both the claim and the defences were repeatedly amended, and the date for the hearing of the action was fixed for 2 November 1992.

At this late stage on 22 October 1992 the brokers filed an application to strike out the plaintiff's claim on the ground that it disclosed no cause of action. The first and second defendants who had filed their defence on 14 February 1990, and amended their defence on 7 October 1991, also filed an application to strike out the statement of claim on 1 December 1991.

Numerous adjournments then followed and these applications finally came before the Sessions Court Judge on 26 April 1993 when they were fully argued. The matter was then adjourned to 28 May 1993 when the Sessions Court Judge dismissed the applications to strike out the claim with costs. She also dismissed the application by the brokers to initiate third party proceedings against the KLSE.

The defendants appealed to the High Court at Taiping. The Judge here reversed the Sessions Court Judge and struck out the action. Against this decision the plaintiff applied for leave to appeal. For reasons which Counsel were unable to enlighten us the plaintiff was not able to obtain leave against the first and second defendants, Ng and Saw. He did obtain leave against the brokers. The issue now is whether the Judge was right in striking out the plaintiff's action against the brokers. We held he was not. We now give our reasons for so doing.

The brokers' application in the Sessions Court was based under O. 14 r. 21(1) of the Subordinate Court Rules 1980. This rule is in terms identical to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980. The application alleged that:

(i) the statement of claim did not show any cause of action;

(ii) it was frivolous and vexatious;

(iii) it was an abuse of the process of the Court.

Consequently affidavit evidence was admissible. In this case it was stated that the application would be supported by the affidavit of Muhammad Nadzri Hamzah. This affidavit was affirmed on 15 October 1992.

In this affidavit in para. 3 he said that he had been advised and verily believed that all the averments in the defence of the brokers were true and that the brokers would rely upon them at the trial. In para. 4 he said that the averments in the statement of claim were without foundation, unfair and did not show a cause of action. In para. 5 he said there was no evidence for the plaintiff to aver that the defendants were involved in a fraud and by reason of that the claim was defamatory. In para. 6 he said that he was advised and verily believed that the claim did not show any cause of action, was frivolous and vexatious, and an abuse of the Court process because at the material time the brokers had no responsibility to ensure the genuineness of the share certificates and that he believed that the party with such responsibility was the Registrar of the PI or the Securities Clearing Automated Network System Sdn. Bhd. (SCANS) as all shares whether bought or sold had to be processed through SCANS. He then exhibited a letter from the KLSE dated 26 October 1990. This letter Exh. N1 is a reply to a letter from the brokers' solicitors dated 12 October 1990 (not exhibited). All Exh. N1 says is that the Pahang Investments Public Limited Company was suspended from trading in its shares from 14 October 1985 and taken out of the list of the KLSE on 19 February 1988. On 13 November 1992 Muhammad Nadzri Hamzah filed a further affidavit in which he stated that it was clear from the re-amended statement of claim that there was no basis for the plaintiff's claim against the third defendant.

Pausing here for a moment, we feel obliged to observe that these affidavits of Muhammad Nadzri Hamzah really begged the question as to whether the plaintiff had a cause of action. In effect all Muhammad Nadzri Hamzah was saying was that because the plaintiff had not purchased the shares from the brokers, he had no cause of action because a broker has no responsibility whatsoever to ensure that the shares he delivers to his client are, genuine shares. But this was the very question which the Court had to decide. Muhammad Nadzri Hamzah was not the last word on the subject and his sweeping statement was nothing more than a bare allegation which raised a question of mixed law and fact which had to be settled at the trial. There was no uncontroverted evidence that the establishment of SCANS or the suspension and delisting of PI extinguished any contractual or tortious liability of the brokers to the plaintiff.

As a consequence of this application, the hearing did not take place on that 2 November. To support his statement of claim the plaintiff annexed by way of exhibits to the affidavits he filed in opposition, the contract notes for the

shares he purchased, acknowledgments in writing of the second defendant and correspondence he had with MIA. The following observations are pertinent:

(i) Each of the contract notes (all of which were on the brokers' notepaper) carried the share certificate numbers which were delivered by the brokers. These numbers matched the numbers of the certificates set out in the letter of MIA dated 21 July 1989 in which MIA asserted that these unauthorised shares were the subject matter of public prosecutor's "statements of facts" in the criminal proceedings in Singapore. MIA also gave the names of the persons registered as the holders of these shares. They were all "nominees". In other words the proper inference here is that the plaintiff could call persons to testify at the trial that the shares were forgeries.

(ii) Remembering that PI was suspended on 14 October 1985, the plaintiff produced evidence to show that on 27 November 1985 and again on 20 December 1985 the second defendant Saw had signed a written acknowledgement to confirm that the relevant shares had been paid for by cashier's order but that the contract note for the sales listed would be issued when the shares were relisted. There were three such transactions for 25,000 units on 20 December 1985 and four transactions for 23,000 units covered by the admission on 27 November 1985.

(iii) Since PI had been suspended on 14 October 1985, a question arose as to how or why the third defendant arranged to sell 48 lots of PI shares on 12 November and 20 November 1986 and again another 45 lots on 16 May 1986.

(iv) Whereas the plaintiff expressly contracted to buy shares in the Pahang Investment Public Limited Company, the share certificates which were delivered by the brokers, their servants and agents to the plaintiff were pieces of paper carrying the name of the Pahang Consolidated Company Limited.

(v) There were, several curious features about these pieces of paper which were passed off as genuine shares of PI *viz*:

(a) From a document exhibited at p. 189 of the appeal record the Pahang Consolidated PLC had changed its name to Pahang Investment PLC on 15 October 1984. Many of the share certificates exhibited by the plaintiff, were purportedly issued well after 15 October 1984 but still carried the old name.

(b) All the purported share certificates do not bear the signature of any director or secretary of the company.

(c) They do not bear the account number of the registered shareholders.

(d) They were not printed on security paper.

(e) To support the plaintiff's contention of fraudulent misrepresentation or negligence it is evident from his plea of these facts that he was contending that the brokers should have refused to take delivery of these shares because they knew or ought to have known when the "shares" were handed to them that they were not genuine or at the very least they had been put on inquiry.

Muhammad Nadzri Hamzah's affidavit had to be considered alongside the defence of the brokers. Briefly this is what was pleaded therein:

(i) It was admitted that the two remisiers were their employees.

(ii) The plaintiff was put to proof of all the transactions alleged.

(iii) All the allegations of fraudulent misrepresentation and negligence were denied and it was asserted that the third defendant had no responsibility to the plaintiff as pleaded in para. 8 to 11 of the amended claim.

(iv) It was denied that there was an implied condition in the agreement between the plaintiff and the third defendant that the shares delivered would be valid shares and the plaintiff was put to proof that the shares sold were invalid and issued unlawfully.

(v) After referring to the suspension of PI on 14 October 1985 and the removal of PI from the list on 29 February 1988 the third defendant (without admitting that any of the transactions were in fact put through them as brokers) asserted that all the plaintiff's transactions had in fact been carried out whilst PI was listed. (Since the contract notes exhibited by the plaintiff clearly shows otherwise, this raised serious doubts about the brokers' credibility).

(vi) The KLSE had set up a subsidiary company SCANS, and all orders to buy or sell through KLSE had to be through SCANS.

(vii) The only responsibility the third defendant had was to transmit orders to the KLSE and the defendant had no way of knowing the identity of the seller where it was acting as the buyer's broker.

(viii) As regards the transactions after 14 October 1985 (which the defendants denied has been put through them) the defendants claimed that they were transactions between the plaintiff as a willing buyer and the willing sellers.

In a nutshell the plaintiff's case was that he had paid good money to the brokers through their remisiers and he produced the official receipts of the brokers as proof. He also produced the contract notes on the brokers' note-paper and the alleged forged share certificates and the letters of the MIA. His complaint was that the brokers had received shares which they knew or ought to have known were forgeries.

In a nutshell the defence of the brokers was that they had no responsibility whatsoever to the plaintiff since they were only a conduit pipe for orders between buyer and seller. It must be emphasised here that nowhere in the defence did the brokers assert that the shares they delivered were genuine. They merely denied that they were forgeries and put the plaintiff to proof. Nowhere in the defence or in the affidavits of Muhammad Nadzri Hamzah did the brokers assert that the plaintiff had a remedy against PI under s. 63 of the Companies Act 1965.

The learned High Court Judge has set out the leading cases on the question as to when the Court should exercise its power under O. 18 r. 19(1) of the Rules of High Court in his judgment which is now reported in [1994] 4 CLJ 857; [1994] 3 MLJ p. 691.

At p. 701 of the report there is a reference to *Syarikat Soon Theam Sdn. Bhd. v. Hing Chye Jiu* [1975] 1 MLJ 259. There was no dispute in that case that the shares bought were genuine Haw Par shares. The issue was whether the defendant had in fact placed an order for them. In our case there was substantial *prima facie* evidence that the plaintiff had brought and paid for PI shares through the defendants. The issue was whether the brokers had "completed the order and so rid themselves of the personal liability undertaken by them within the rules of the stock exchange" (to use the words of Chang Min Tat J at p. 260).

It is to be noted that the brokers in our case provided no information whatsoever as to when, where or from whom they acquired the allegedly forged shares which they delivered to the plaintiff. In their defence they were not prepared to assert that the shares were genuine. Their case was that as brokers they had no duty whatsoever to ensure that the shares they bought were genuine. Thus the question as to whether the shares were genuine or forged was at large, and very much a matter for proof at the trial. Indeed the refusal of the brokers to take a position on the issue of the genuineness of the shares resulted in the dismissal of their third party proceedings against the KLSE in the Sessions Court.

For the purposes of striking out under O. 14 r. 21(a) however it had to be assumed that the plaintiff's plea that the shares were forged was a true averment. If they were indeed forged it is difficult to see how s. 63 of the Companies Act has any application. The section will only come into play if it is first shown that offending shares were issued by the board of directors of PI and those shares were invalid by reason of some provision of the Companies Act or other written law or of the memorandum and articles of association of the company. It would be an altogether different proposition if a criminal had without any authority from the board of PI, duplicated the format of its share certificates and sold these as "genuine" shares on the open market. With the greatest respect to the High Court Judge who concluded his judgment by saying that the plaintiff could go after Pahang Consolidated and was therefore not without remedy (see p. 702), there was no evidence whatsoever that these "shares" had in fact been issued by the board of Pahang Consolidated.

Section 63 of our Companies Act 1965 is in identical terms to the Australian s. 63 (see *Australian Company Law and Practice* at p. 233, where the conditions precedent to the application of the section are spelt out in p. 234).

Ruben v. Great Fingall Consolidated [1906] AC 439 is an instance where a company was not estopped from disputing the validity of a share certificate forged by the secretary who then purported to issue it on behalf of the company in return for money advance. *South London Greyhound Racecourses Ltd. v. Wake* [1931] 1 Ch. 496 is another where it was held that a share certificate sealed without the necessary authority of the board of directors was a forgery, notwithstanding that the signatures were genuine. (See *Palmers Company, Law* 24th Edn., 1987, p. 254). *Dixon v. Kennaway & Co*. [1900] 1 Ch. 833 is yet another authority on forged certificates where the Court held that only in the absence of an effective remedy against the vendor or broker through whose fraud or default the title is bad, can the buyer proceed against the company. (See Buckley on the *Companies Acts*, 113th Edn., p. 186). There are other cases on the impact of forged certificates on the liability or the absence thereof on the part of the company which purportedly issued them (See 9 *English and Empire Digest* (1975 Reissue) pp. 313-315).

In this context we think that Mr. Pennington's comments in his *Company Law* 2nd Edn., at pp. 112-113 not irrelevant. He said:

> The first question to be asked is whether the person who relied on the documents was entitled to assume that the board of directors had authorised its execution. If the document was signed by a director and the only defect alleged is that no proper board meeting was held, the outsider is entitled to make this assumption, and the company cannot contend that the document is a forgery. If, however,

> the document was not signed by a director but by another person, the outsider must show that the board has held out that person as having authority to sign on behalf of the company, which it may have done by appointing him to a position under the company which in other companies normally carries the power to sign the kind of document in question. The company is then bound by the document because it was signed by a person who had apparent authority to sign it, and the company is estopped from denying his authority. But if signing the document was not within the apparent authority of the person who signed it, the outsider who relies on it cannot treat it as having been signed on the company's behalf and if it purports on its face to have been so signed, the company can contend that it is a forgery, because it purports to be a different document from what it really is.

In the present case the plaintiff was effectively contending that the brokers were not entitled to assume that the board of directors of Pahang Investment PLC had authorised the issue of these shares because they did not even carry the signatures of any director or secretary of the company. The seal of the company was not attested. As for the change in name the point was that the brokers should have put on alert when they saw that the share certificates were purportedly issued in 1985 in the name of Pahang Consolidated which was no longer a legal way of describing the company since that name was dropped on 15 October 1984.

Section 63 of the Companies Act 1965 was not pleaded or even put forward in the Session Court by the brokers' Counsel and he should not have been permitted to raise it on appeal in the High Court. There was not a shred of evidence that these shares had in fact been issued by the Pahang Investment Public Limited Company. Of course the onus in the first instance was upon the plaintiff to show why the shares were forgeries but it cannot be said that he did not come up with sufficient material which cried out for an inquiry. The issue of over 32 million forged shares in a company trading on the KLSE may be thought to be a public scandal. Admittedly after the suspension of PI in October 1985, the chairman of the KLSE was advising the public in April 1988 to await police investigation in April 1988. We are unable to say from the material before us whether after all these years of waiting the police investigation was completed and if so what the outcome was. Nor can we see how it is relevant to civil liability, which must be independently established.

If the shares were indeed forgeries in the sense that they had been "issued" without the actual or ostensible authority of the board of director of Pahang Investment Public Limited Company, the brokers were liable at common law to refund the price paid and the commission: see *Lamert v. Health* [1846] 153 ER 941 (also at *English & Empire Digest Replacement* Vol. 1965 para. 54, p. 397). Although the brokers took the plaintiff's money they are

claiming that they had no duty whatsoever to the plaintiff except as a "conduit pipe" for the transmission of messages. This is a very sweeping statement and the onus of laying the factual basis for this startling proposition was squarely upon the brokers. At the behest of the brokers' Counsel the Judge at the High Court level **assumed** that the Pahang Consolidated shares were "genuine" when such a finding of fact could only be made at the end of the trial.

Order 18 r. 19(1)(b)(c) and (d) have no application if the disputed facts once established at the trial will support a cause of action. The importance of first establishing the facts before attempting short cuts has been the subject of cases under O. 33. The reasoning applies equally to applications under O. 18 and 19. The following statements should help in establishing the correct approach:

(i) "If this issue were determined as a preliminary issue, the preliminary point might go to the House of Lords. They might say: "You must get the facts before we decide the law." Rather than put the parties to all that expense (and, I may add, delay), I think that we should have the facts ascertained in the trial Court before the difficult and important point of law is decided." *Richards v. Naum* [1966] 3 All ER 812.

(ii) "My Lords, in common with all your Lordships, I agree that this should be treated as the question to be answered. But I hope your Lordships' agreement so to treat it will not discourage others to invoke the preliminary point procedure in unsuitable cases, or lead those whose task it is to decide whether or not the trial of preliminary points should be ordered to be other than extremely cautious before acceding to pleas for the making of such orders as a result of attractively advanced submissions founded on pleas of supposed economy." Lord Roskill in *Allen v. Gulf Oil Refining Ltd*. [1981] 1 All ER 353.

(iii) "The learned Judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether Case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which remained to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of Courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily

decided, cases outside this guiding principle should at least be exceptional." Lord Wilberfore in the case of *Tilling v. Whiteman* [1980] AC 1.

Karpal Singh also submitted that on grounds of delay alone the application was properly dismissed by the Sessions Court Judge. No proper reasons were given why the brokers made their application so very late especially after lengthy adjournments for months at a time had been given to permit them to file their defence. We agree but our decision to allow this appeal is based on much firmer ground. The High Court Judge very properly referred to the principles set out in *Wenlock v. Moloney* [1965] 2 All ER 871 at 874. If he had evaluated the contested facts in their proper perspective we are in no doubt that he should have upheld the decision of the Sessions Court Judge.

We therefore allowed this appeal and directed that the respondent should pay the costs of this appeal and the costs in the High Court. The order of the Sessions Court Judge dismissing the third defendant's application is reinstated. Accordingly this case shall go to trial in the Sessions Court. The appellant's deposit is hereby ordered to be refunded to him.

Abu Mansor Ali JCA:

I have had the benefit of reading the judgment in draft of my brother Judge, Dato' Mahadev Shankar with which I am in entire agreement.

At the end of argument, we were unanimous in our finding that we should allow this appeal and reinstate the judgment of the learned Sessions Court Judge dismissing the third defendant's application to strike out the plaintiff's statement of claim.

As has been stated only too often the power to dismiss an action summarily is a drastic power and should only be exercised with the utmost caution in plain and obvious cases: See *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 28 where the Federal Court set out the principle and directed that as there were triable issues the proper course would be for the matter to be tried in the usual way in open Court.

I agree with the judgment of my brother Judge that there are issues which need ventilating at a proper trial and I agree with his finding that the issue of forgery cannot be presumed but must be proved in the light of the shares not apparently having been issued by any of the persons authorised to do so by the company and yet held out as good shares by the defendant. I am satisfied

if we were not to allow this appeal we would be licensing the defendant to throw up their hands, so to say, and say to the plaintiff "we like the colour of your money but do not hold us responsible for those shares we have sold to you. You find somebody else." We think we are not about to allow them to do that. For that reason we allow this appeal with those orders granted by my brother Judge.

Reported by Anne Khoo